Intergovernmental Personnel Act

Intergovernmental Personnel Act

5 U.S.C. §§ 3371-3375

- Permits assignments to and from universities and other entities
- Assignees may be either appointed or detailed
  - Appointees are Federal employees for most purposes
  - Detailees are not Federal employees for most purposes

Types of Assignments

- Incoming details
  - Employee is not a Federal employee
- Outgoing details
  - Employee remains employee of agency
- Incoming appointments
  - Employee becomes a Federal employee
- Outgoing appointments (LWOP)
  - Employee becomes employee of state; probably because of need to exercise authority

Incoming Detailees

- During the period of assignment, a detailee is deemed an employee of the agency for the purpose of:
  - chapter 73 of title 5 (non-criminal conduct provisions),
  - sections 203, 205, 207, 208, and 209 of title 18,
  - Ethics in Government Act
  - the Federal Tort Claims Act and any other Federal tort liability statute.

IPA Ethics Rules

- The criminal ethics statutes apply to assignees, regardless of appointment or detail
- Conflict of interest and post-employment statutes reinforce each other with respect to the detailee's home institution

IPA Ethics Rules

- Some non-criminal provisions apply to detailees (5 U.S.C. Chap. 73):
  - loyalty and striking
  - alcohol and drug abuse
  - gifts to superiors
  - gifts from prohibited sources
  - Foreign Gifts and Decorations Act
  - Hatch Act

IPA Ethics Rules

- Only specified statutes apply to detailees, so other provisions do not apply
- Financial disclosure did not apply to detailees until recently
- Ethics training and many other provisions apply to appointees, but do NOT apply to detailees

IPA Conflicts of Interest

- Conflict of interest statute applies to all incoming assignees
- Prohibits involvement in matters affecting the interests of the assignee, spouse, *or employer*
- Violation is subject to civil and criminal penalties, including up to five years imprisonment

IPA Conflicts of Interest

- Assignee's continuing employment relationship with home institution is a potential felony conflict of interest
- Rule: Assignees may not participate in matters their university has an interest in
  - includes making decisions or recommendations, giving advice, or influencing outcomes
  - includes both technical and business decisions

IPA Conflicts of Interest

- If assignee's university is involved in a program or project, most technical, business, and program management activities will be prohibited
- Many IPA conflict anomalies result from the duties contemplated by the assignment

Representational Activities

- Part-time IPAs
  - agreement may allow percentage of time for work for home institution
    - allows detailee to retain PI/Co-I status
  - but, §§ 203/205 apply to detailees
    - incoming IPAs may not represent before the gov't
    - may continue non-representational duties
    - contrast this with *outgoing* IPAs, who may be authorized to represent the outside institution before the gov't.

Post-employment

- Post-employment restrictions apply fully
- After assignment ends, assignee may not represent home institution to gov't:
  - forever: on contracts, grants or agreements the assignee worked on during assignment
  - for two years: on matters the assignee didn't actually work on, but was responsible for
  - for one year: on any matter if the assignee was paid at 86.5% of level II of the Executive Schedule ($135,805)

IPA Ethics Guidelines

- Proposed assignments should be screened for potential conflicts prior to execution by the sponsoring office
- Administrative review is not sufficient, because IPA duty descriptions are often kept generic for flexibility
- Once in gov’t, assignees must maintain strict disqualification from involvement with home institution

IPA Ethics Guidelines

- Ensure that assignees' IPA status is widely known within organization
- Detailees are not required by law to receive ethics training, but a training requirement should be added to IPA agreements
- Consider whether an assignment to a management position may be more appropriate for an appointment

IPA Ethics Guidelines

- Detailees should be provided with written ethics materials upon entry
- Detailees should be offered an opportunity to meet with local counsel to discuss potential conflicts

OUTGOING IPA'S

Intergovernmental Personnel Act

5 U.S.C. §§ 3371-3375

- Permits assignment of agency employees to “host organizations”
- Assignees may be appointed or detailed
  - Appointees remain employees of their agency
  - Thus, conflict-of-interest statutes, Standards of Conduct, and agency supplemental regulations apply, as well as any rules of the host organization

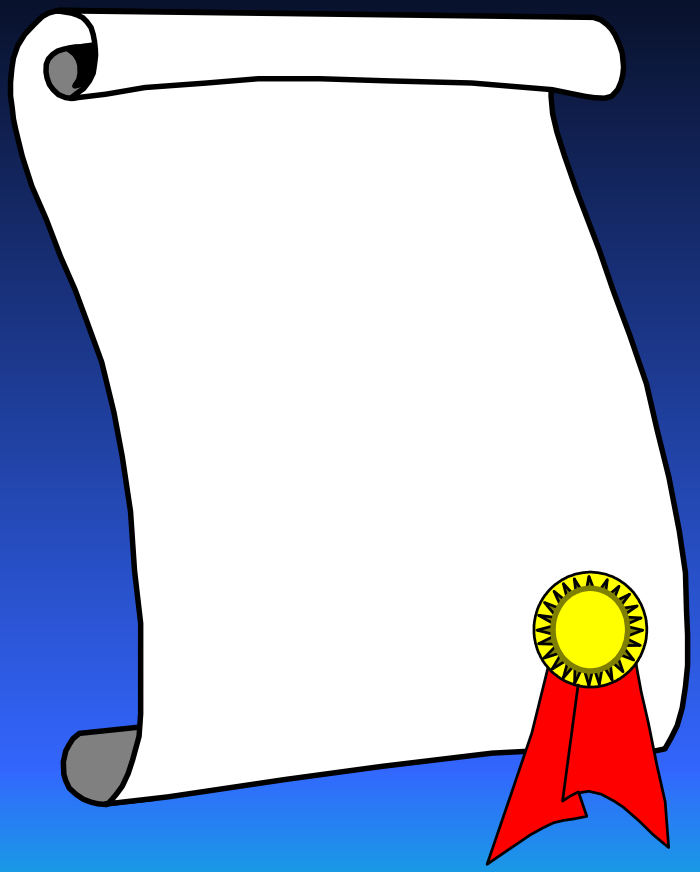
Content of Outgoing IPA Assignment - § 3372

- Must be for “work of mutual concern” to assignee’s agency and the host organization
- Federal agency must determine that the work to be performed “will be beneficial to both” the agency and the host organization

Return Service Requirement

- Assignee must agree “to serve in the civil service upon the completion of the assignment for a period equal to the length of the assignment”
- Failure to satisfy the return service requirement makes employee liable to USG for payment of all expenses of the assignment (except salary, benefits)
- Per 5 CFR 334.105, agency may waive reimbursement for “good and sufficient reason”

Written Agreement Required



- 3 Parties
- Executed prior to assignment
- Per 5 CFR 334.106, must record “the obligations and responsibilities of the parties as specified in 5 USC 3373-3375” - what’s that mean??

Contents of Agreement

- Length of IPA
- Who pays for what
- Who directs employee
- Most important - what will the employee be doing

Potential Outgoing IPA Ethics Issues

- Representing host organization on particular matter involving Federal agency
- Participating personally and substantially on matter involving assignee's agency
- Negotiating for employment with host or third-party organization during IPA
- Post-employment issues
- 807 issues

SCENARIOS

- Agency does/does not want employee involved in particular matter
- “Out of the blue” offers of employment
- “Wink and nudge” IPA’s

If the agency wants the assignee involved in particular matters as part of the IPA, *specify that in the IPA agreement*

- OLC Opinion of January 11, 1999
- OGE Advisory Opinion 99 X 17, September 21, 1999

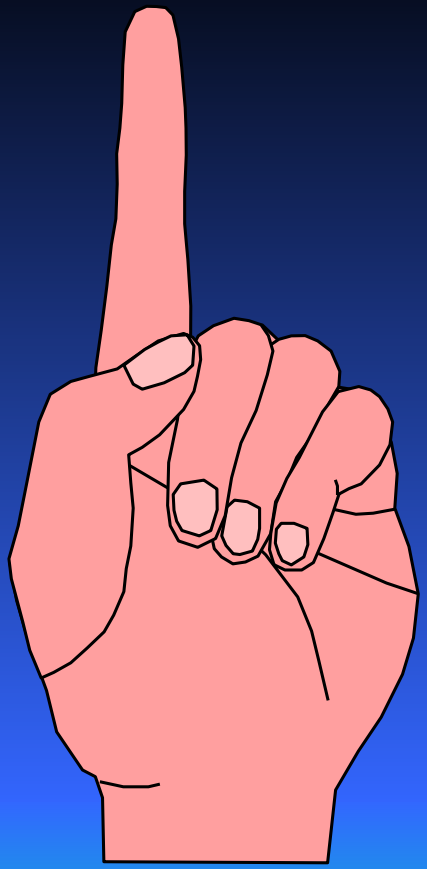
OLC Opinion of January 11, 1999

- Conclusion - No 203 or 205 problem if head of Federal agency "determines that work of 'mutual concern' . . . includes representational contacts with the federal government by the [assignee] . . ., and the IPA assignment affirmatively authorizes such contacts."

OLC's Rationale

- Neither 203 or 205 prohibit contact with Federal agencies as part of official duties
- IPA authorizes agency head to determine that representational contacts will be "mutually beneficial" to agency and host organization
- When agency head makes that determination and writes it in the IPA agreement, the contacts become part of assignee's official duties

BE CAREFUL!



- Can the agency properly find that making representational contacts part of assignee's duties involves "work of mutual concern?"
- Would the assignee's representational contacts be "beneficial to both organizations?"

OGE Advisory Opinion 99 X 17

- Reaches same conclusion as OLC opinion, but with respect to 18 USC § 208: if the IPA agreement directs the assignee to perform duties that would otherwise cause the employee an actual or potential conflict of interest, there is no conflict

OGE's Reasoning in 99 X 17

- The IPA "constitutes sufficient statutory authority" to resolve the problem of conflicting loyalties that an assignee may otherwise face
- OGE analogized to the OLC opinions permitting official service on outside boards where agency possessed "specific authority" to assign employee such duty

PRACTICE TIPS

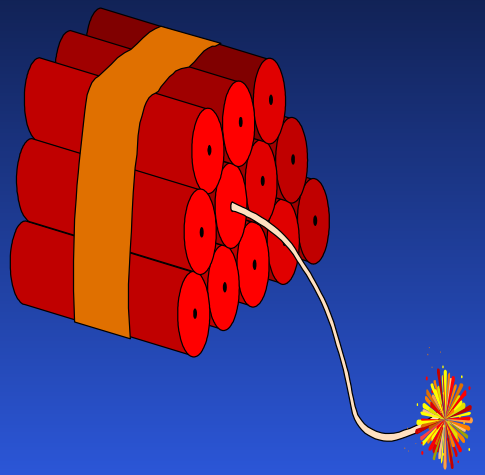
- The letter of the OLC and OGE opinions needs to be followed when drafting or amending IPA agreements, because you can’t insulate behavior after the fact
- If problem arises, try to read the facts outside the coverage of 203/205/208
- Authorizing some representational contacts or participation in particular matters does not authorize all such activity by assignee

NEGOTIATING FOR EMPLOYMENT

- “Out of the blue” offers from host or third party organization
- Offers from host organization in case of “wink and nudge” IPA’s
- Availability of waivers under 18 USC § 208(b)(1)

POSSIBLE ISSUES

- How can assignee perform any IPA duties while negotiating
- How can you grant waiver if duties have been performed after start of negotiations
- Why would agency grant waiver for “out of the blue” offers
- Why wouldn’t agency grant waiver in case of “wink and nudge” IPA’s
- Requirements of 5 CFR 2640.301(b)
- What else can agency do?

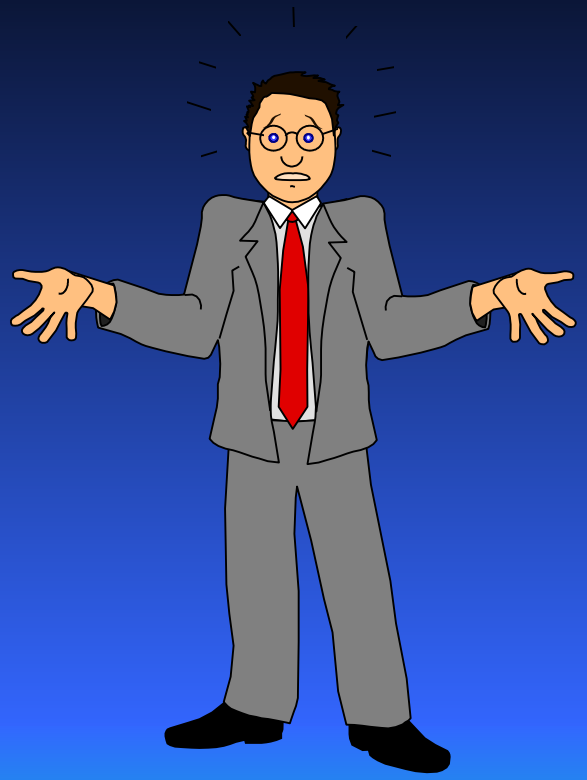


DOES 208 APPLY HERE??

- Is the IPA agreement the particular matter?
- What is the “financial interest” involved?
- Is there a “direct and predictable” effect on the financial interest?
- Does OGE 99 X 17 answer the question?

WHAT TO DO WHEN EMPLOYEE NOTIFIES YOU OF NEGOTIATIONS

- Order employee to divest interest
- Put employee on leave
- Terminate IPA
- Do nothing - let the employee sink or swim on own



performed once negotiations have begun?

Per 5 CFR 2640.301(a), a 208(b)(1) waiver must be issued prior to employee taking any action on particular matters affecting agency

5 C.F.R. § 2640.301(b) - Factors to consider before granting waiver

- Type of financial interest involved
- Identity of the person whose financial interest is involved and relationship of that person to employee
- Dollar value of financial interest
- Nature and importance of employee's role in the matter
- Sensitivity of matter and need for employee's services

Wink and Nudge IPA's

- For waiver, consider (a) nature and importance of employee's role in the matter and (b) sensitivity of matter and need for employee's services
- What consideration should be given to the reimbursement of expenses requirement in IPA in granting the waiver?

MAGIC WORDS

- IMPORTANT: The ultimate finding to be made is that the assignee's financial interest "is not so substantial as to question the integrity of his/her service to the Government

Post-employment

- Post-employment restrictions apply fully
- After assignment ends, assignee may not represent new employer to USG:
  - forever: on matters within scope of IPA?
  - does this override the the two year ban on matters the assignee didn't actually work on, but was responsible for
  - how about the one year ban on any matter, if the assignee was paid at the new "senior employee rate" or better?

Conflict Waivers

- Standard: “interest is not so substantial”
  - Very difficult standard for IPAs’ home institution
  - Principal employment, principal loyalty is not to the Government
- OGE is reluctant to concur in waivers
- Prone to abuse

NASA Astrobiology Institute IPA Conflict of Interest Waiver

- Virtual Institute
- Advancement of Astrobiology
- Cooperative Agreements
  - Competitively selected
  - 15 teams; ~$1M/yr. apiece
  - No deliverables; just coordination of research, and publication of results

History of Director's Position

- First Director
  - Interim, civil servant, set up the NAI
- Second Director
  - IPA, no conflicts
- Third Director
  - NAI members want an active researcher
  - NAI operations are established, management can be handled by Deputy Director

Director Designate

- IPA detailee from UCLA
- Former Principal Investigator for UCLA NAI Team
- Tenured Professor
- Will return to UCLA at the conclusion of the detail

Waiver Factors
5 CFR 2640.301

- (b)(1): Type of interest
- (b)(2): Identity of person whose financial interests are involved
- (b)(3): Value of disqualifying interest
- (b)(4): Value of underlying financial interest

Factors
5 C.F.R. 2640.301

- (b)(5): Nature and importance of employee's role in the matter, including the extent to which the employee is called upon to exercise discretion in the matter

Factors
5 C.F.R. 2640.301(b)(6)

- (b)(6)(i) Sensitivity of the matter
- (b)(6)(ii): Need for for the employee's services in the particular matter
- (b)(6)(iii): Adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that the integrity of the employee's services would be questioned by a reasonable person

Director's Duties

- Redrafted PDs of Director and Deputy Director to reduce conflicts
  - Shifted management responsibility to Deputy Director
- Director's Primary Roles are to:
  - Coordinate activities
  - Provide vision for the discipline
  - Advocate for astrobiology
- Will interact with teams as a peer, not a manager

Conflict Mitigation

- Will be recused from all management, procurement, or staffing duties relating to, or directly or indirectly affecting, UCLA
  - Will not develop solicitations
  - Will not review, select, or negotiate proposals
  - Will not evaluate performance
- All operational, management and procurement duties will be handled by Deputy Director

Director's Discretionary Fund

- Majority of current activities can be identified and given separate line budgets
- These tasks, subtasks, or grants will be implemented by the Deputy Director
  - Focus Groups
  - conferences, symposia, and workshops
  - student research and travel scholarships
  - small research pilot awards costs
- Any funds remaining will be referred to the NAI's Executive Council for endorsement by a majority vote.

Executive Council

- Composed of PIs of each team, plus Director and Deputy Director
  - Other interested parties are invited to observe
- Will decide on discretionary funds, if any
  - Director will have 1 vote in 18
- Will be briefed on Director's conflict status and mitigation plan
- Will be chartered to raise concerns to ARC or HQ ethics officials

Semi-Annual Ethics Review

- Conducted by ARC and HQ ethics officials
- Review of
  - speaking engagements,
  - abstracts presented to professional meetings,
  - efforts of science/strategy advocacy or education undertaken by the Director,
  - a history of funding actions taken by the NAI in the preceding six months (provided and explained by the Deputy Director)
  - plan of activities for the next six months.

Summary

- Deputy Director will manage NAI
- Director will serve primarily in research and advocacy role
- Director's involvement with UCLA will be primarily in the research role
- Executive Council will approve discretionary funding by majority vote
- Semi-annual ethics review

Indirect Rates

- OPM formerly prohibited recognition of indirect costs in IPA agreements
- DCAA concluded that this is contrary to the Cost Accounting Standards, and that indirect rates should be recognized
- However, indirect rates must be allowable and allocable under FAR Part 31

Indirect Rates

- Personnelists should not be negotiating indirect rates for IPA agreements
  - Must be allocable
  - Must be commensurate with the benefits received
- Should be a DCAA-approved IPA indirect rate agreement
  - Do not just accept an existing contract rate